

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

06-80202

CIVIL - MIDDLEBROOKS

CASE NO.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

DELANO N. STA.ANA

Defendant.

MAGISTRATE JUDGE  
JOHNSON

FILED BY  
2006 MAR -2 PM 1:48  
CLARENCE H. HARRIS  
CLERK U.S. DISTRICT  
S.D. OF FL. - MIAMI

**APPLICATION FOR AN ORDER OF COURT DIRECTING COMPLIANCE WITH  
AN ORDER ISSUED BY THE SECURITIES AND EXCHANGE COMMISSION**

Plaintiff Securities and Exchange Commission files this Application for an Order of Court Directing Compliance with an Order Issued by the Securities and Exchange Commission, and alleges as follows:

1. The Commission brings this action for an Order compelling Defendant Delano N. Sta.Ana to comply with the disgorgement, prejudgment interest, and civil penalty provisions of an order imposing remedial sanctions issued by the Commission in In the Matter of Lawrence S. Powell and Delano N. Sta.Ana, A.P. File No. 3-11794, Securities Exchange Act of 1934 Release No. 51017, Investment Advisers Act of 1940 Release No. 2342, Investment Company Act of 1940 Release Act No. 26722 (Jan. 11, 2005) (the "Commission Order"). Despite having been served with the Commission Order and a demand that he pay the amounts the Order directs him to pay, Sta.Ana has failed to abide by the Commission Order and make the required payments.

## JURISDICTION AND VENUE

2. The Commission brings this action pursuant to Section 21(e) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78u(e)]; Section 209(d) of the Investment Advisers Act of 1940 (“Advisers Act”) [15 U.S.C. 80b-9]; and Section 42(d) of the Investment Company Act of 1940 (“Investment Company Act”) [15 U.S.C. 80a-42]; for an order of this Court commanding Sta.Ana to comply with the Commission Order and other equitable relief.

3. Venue in the Southern District of Florida is proper pursuant to Section 27 of the Exchange Act [15 U.S.C. § 78aa]; Section 214 of the Advisers Act [15 U.S.C. 80b-14]; and Section 44 of the Investment Company Act [15 U.S.C. 80a-44].

4. Between February 2000 and September 2003, a time period encompassed in the Commission Order, Sta.Ana was associated with Kaplan & Co. Securities, Inc. (“Kaplan & Co.”), a broker-dealer and investment adviser based in Boca Raton. He lived in Boca Raton from at least December 2001 through early 2005. Thus, Sta.Ana engaged in the activity that is the subject of the Commission Order in the Southern District of Florida as well as resided there, and continued to live in Boca Raton when the Commission issued its Order on January 11, 2005. The Commission believes Sta.Ana currently resides in the Philippines.

## FACTS

5. On January 11, 2005, the Commission instituted settled public administrative and cease-and-desist proceedings against Sta.Ana and one other individual in connection with prohibited mutual fund market timing and late trading activities they engaged in while associated with Kaplan & Co. Sta.Ana co-headed the mutual fund timing group at Kaplan & Co. and was responsible for developing relationships between Kaplan & Co. and the mutual fund timing group’s

institutional clients, negotiating market timing arrangements with mutual funds, and orchestrating the institutional mutual fund trading activity at Kaplan & Co.

6. On December 22, 2004, Sta.Ana executed an Offer of Settlement, in which he consented to the entry of the Commission Order without admitting or denying the findings. The Order, issued on January 11, 2005 and attached as Exhibit 1 to this Application, finds that Sta.Ana and the other individual engaged in a course of business that operated as a fraud and deceit through the use of various devices to hide the identities of their customers from mutual funds to allow prohibited market timing (short-term trading to exploit pricing inefficiencies) in those mutual funds. The Commission Order also finds that Sta.Ana and the other individual engaged in a fraudulent scheme to late trade mutual fund shares on behalf of their market timing customers.

7. Among other things, the Commission Order contains financial sanctions. It directs Sta.Ana to pay disgorgement and prejudgment interest of \$255,000 and a civil penalty of \$120,000 within 180 days of entry of the Order (July 12, 2005). Exhibit 1 at ¶¶4(F) and (G). The Commission Order provided that Sta.Ana pay \$85,000 of the \$255,000 disgorgement and prejudgment interest and \$40,000 of the \$120,000 civil penalty within 90 days of entry. Sta.Ana made that payment, although not until 10 weeks after it was due. That left \$250,000 due and owing by July 12, 2005. Sta.Ana failed to make any more payments by July 12, but did pay \$100,000 on January 24, 2006. Thus, Sta.Ana still owes \$150,000 in disgorgement, prejudgment interest and a civil penalty under the Commission Order.

8. The Office of the Secretary of the Commission served the Commission Order on Sta.Ana by certified mail to his counsel on or about January 18, 2005.

9. Sta.Ana has failed to pay the disgorgement, prejudgment interest and civil penalty required under the Commission Order. On July 22, 2005 the Commission sent a demand letter to Sta.Ana for the amounts then due and owing under the Order. Although Sta.Ana has since paid \$100,000, he still owes \$150,000.

10. Thus, despite having been served with both the Commission Order and the demand letter, Sta.Ana has not complied with the disgorgement, prejudgment interest, and civil penalty provisions of the Commission Order.

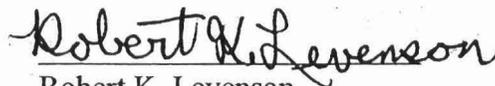
**PRAYER FOR RELIEF**

WHEREFORE, the Commission respectfully requests that the Court:

- a. Issue an Order pursuant to Section 21(e) of the Exchange Act [15 U.S.C. § 78u(e)]; Section 209(d) of the Advisers Act [15 U.S.C. 80b-9]; and Section 42(d) of the Investment Company Act [15 U.S.C. 80a-42] directing Sta.Ana to pay \$150,000 in disgorgement, prejudgment interest, and civil penalty, plus post-judgment interest from January 11, 2005 until he satisfies the terms of the Commission Order; and
- b. Grant such other equitable relief as the Court deems necessary or appropriate.

March 2, 2006

Respectfully submitted,



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U.S. Securities and Exchange Commission

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 51017 / January 11, 2005

INVESTMENT ADVISERS ACT OF 1940
Release No. 2342 / January 11, 2005

INVESTMENT COMPANY ACT OF 1940
Release No. 26722 / January 11, 2005

ADMINISTRATIVE PROCEEDING
File No. 3-11794

CORRECTED

In the Matter of

LAWRENCE S. POWELL AND
DELANO N. STA.ANA,

Respondents.

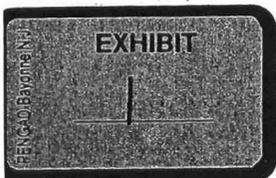
ORDER INSTITUTING PUBLIC
ADMINISTRATIVE AND CEASE-AND-DESIST
PROCEEDINGS, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND A
CEASE-AND-DESIST ORDER PURSUANT TO
SECTIONS 15(b) AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
SECTION 203(f) OF THE INVESTMENT
ADVISERS ACT OF 1940, AND SECTIONS 9
(b) AND 9(f) OF THE INVESTMENT
COMPANY ACT OF 1940

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Lawrence S. Powell and Delano N. Sta.Ana ("Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer of Settlement ("Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which



the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Section 203(f) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Order"); as set forth below.

### III.

On the basis of this Order and Respondents' Offers, the Commission finds<sup>1</sup> that:

#### Summary

1. Over the course of three and a half years, Respondents engaged in a course of business that operated as a fraud and deceit in connection with the market timing and late trading of mutual fund shares on behalf of institutional customers. Respondents engaged in this misconduct, from early 2000 through approximately September 2003, while they established and co-headed the (now defunct) institutional mutual fund group of Kaplan & Co. Securities, Inc. ("Kaplan & Co.").

#### Respondents

2. Respondents were registered representatives associated with Kaplan & Co., a Florida-based broker-dealer and an investment adviser registered with the Commission, from approximately January 2000 through October 2003. Respondent Powell, 40 years old, is a resident of Palm Beach Gardens, Florida. Respondent Sta.Ana, 31 years old, is a resident of Boca Raton, Florida.

#### Other Relevant Entities

3. Kaplan & Co., located in Boca Raton, Florida, has been registered with the Commission as a broker-dealer since September 15, 1995 and as an investment adviser since March 21, 2003. As a broker-dealer, Kaplan & Co. assisted institutional investors, mainly hedge funds, in purchasing and redeeming shares of third party mutual funds.

#### Respondents' Misconduct

##### Market Timing

4. From 2000 through approximately September 2003 (the "relevant period"), Respondents advised their customers that establishing multiple brokerage accounts would enhance the customers' ability to circumvent mutual fund restrictions concerning excessive trading. Kaplan & Co. routinely opened multiple accounts on behalf of its timing customers so that when a mutual fund prohibited further transactions by a specific customer's account due to market timing abuses, the customer could still continue to market time the fund through a different, already established, account. This

allowed Kaplan & Co.'s customers to use new accounts to continue their market timing activities after existing accounts had been banned for market timing because the mutual funds did not recognize the transactions as originating from banned customers.

5. During the relevant period, Respondents used multiple registered representative numbers ("rep numbers") to further evade detection by the mutual funds and fraudulently conceal the identities of the Kaplan & Co. registered representatives from mutual funds. In many cases, mutual funds would identify a specific Kaplan & Co. rep number as a known market timer and ban further transactions effected by the registered representative associated with that rep number. Since most mutual funds monitored registered representatives' transactions by their rep numbers, rather than by their names, Respondents used multiple rep numbers to fraudulently hide the identities of the Kaplan & Co. registered representatives from the mutual funds.

6. During the relevant period, Respondents also fraudulently used multiple branch codes to hide the identity of the Kaplan & Co. Florida branch as the originating branch of the transactions. Kaplan & Co. used two different branch codes to place trades through one clearing firm. Respondents devised this plan after mutual funds began to routinely recognize Kaplan & Co.'s Florida branch code and block trades originating from that branch. Respondents used Kaplan & Co.'s New York branch office to establish a second branch code, which was not immediately recognizable to the mutual funds. This strategy was implemented and the new branch code was utilized even though no market timing trades were actually effected from Kaplan & Co.'s New York branch. By using a new branch code, Kaplan & Co.'s customers could continue market timing in funds from which they and Kaplan & Co.'s Florida branch had previously been banned.

7. From 2000 through approximately September 2003, Respondents facilitated fraudulent market timing activities by their customers by establishing relationships with multiple clearing firms. Opening accounts at multiple clearing firms enabled Respondents' customers to further conceal their market timing activities from the mutual funds. Customers could hide their identities from the mutual funds by using the new clearing firm identifiers and account numbers associated with each new clearing firm. The use of additional clearing firms allowed Respondents' customers, once identified by a mutual fund as a market timer, to switch to a different clearing firm to continue market timing undetected. It also allowed the customers to simultaneously use accounts from multiple clearing firms to facilitate their market timing activities.

### **Late Trading**

8. From 2000 through approximately September 2003, Respondents engaged in a fraudulent scheme to late trade mutual fund shares on behalf of their market timing customers. Respondents effected mutual fund trades for orders they received after 4:00 p.m. ET, allowing their customers to receive the same-day net asset value ("NAV") pricing on those trades (as though the orders were received prior to the close of the stock market at 4:00 p.m. ET, the time as of which the funds calculated their NAV). This system allowed Kaplan & Co.'s customers to capitalize on news events or market changes occurring after the 4:00 p.m. ET close of the stock market.

Generally, Respondents' customers sent Kaplan & Co. a list of their proposed trades before 2:30 p.m. each day. These proposed trades reflected only tentative trading instructions. Kaplan & Co. did not execute the proposed trades until the customer subsequently approved the order, orally or via e-mail or facsimile. These approvals were almost uniformly received after 4:00 p.m. ET. Respondents were aware that their customers were taking advantage of post-4:00 p.m. market news in determining whether to effect transactions.

9. During the relevant time period, Respondents also engaged in the "next-day busting" of orders. On numerous occasions, the mutual fund group effected trades for customers and then called or e-mailed the clearing firm the following morning requesting that they contact the mutual fund and cancel or "bust" the trade. In some instances, the mutual fund group falsely told the clearing firm that the order had been "erroneously entered," when in fact, the timing customer had simply changed its mind about placing the order.

### **Conclusions**

10. As a result of the conduct described above, Respondents willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit the use of any device, scheme, or artifice to defraud in connection with the purchase or sale of securities.

11. As a result of the conduct described above, Respondents willfully aided and abetted and caused Kaplan & Co.'s violations of Section 15(c)(1) of the Exchange Act, which prohibits a broker-dealer from using interstate facilities or the mails to effect or induce transactions in securities by means of any manipulative, deceptive or other fraudulent device or contrivance.

12. As a result of the conduct described above, Respondents willfully aided and abetted and caused Kaplan & Co.'s violations of Rule 22c-1 promulgated under Section 22(c) of the Investment Company Act, which provides that "[n]o registered investment company issuing any redeemable security, no person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and no principal underwriter of, or dealer in any such security shall sell, redeem, or repurchase any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security."

### **Respondents' Cooperation**

In determining to accept the Offers, the Commission considered Respondents' cooperation with the Commission staff.

### **IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents Powell and Sta.Ana's Offers.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act,

Section 203(f) of the Advisers Act, and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondents Powell and Sta.Ana cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;

B. Respondents Powell and Sta.Ana cease and desist from causing any violations and any future violations of Section 15(c)(1) of the Exchange Act;

C. Respondents Powell and Sta.Ana cease and desist from causing any violations of Section Rule 22c-1 of the Investment Company Act;

D. Respondents Powell and Sta.Ana be, and hereby are barred from association with any broker, dealer or investment adviser, and are prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter;

E. Any reapplication for association by either of the Respondents will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondents, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission Order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission Order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission Order;

F. IT IS FURTHER ORDERED that Respondents shall each, within 180 days of the entry of this order, pay disgorgement and prejudgment interest in the amount of \$255,000 into the United States Treasury, provided that each Respondent pay at least \$85,000 of his \$255,000 within 90 days of the entry of this Order. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, Stop 0-3, VA 22312; and (D) submitted under cover letter that identifies Powell and Sta.Ana, respectively, as Respondents in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Glenn S. Gordon, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Southeast Regional Office, 801 Brickell Avenue, 18th Floor, Miami, Florida 33131; and

G. IT IS FURTHER ORDERED that Respondents shall each, within 180 days of the entry of this Order, pay a civil money penalty in the amount of \$120,000 to the United States Treasury, provided that each Respondent pay at least \$40,000 of his \$120,000 within 90 days of the entry of this

Order. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Powell and Sta.Ana, respectively, as Respondents in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Glenn S. Gordon, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Southeast Regional Office, 801 Brickell Avenue, 18th Floor, Miami, Florida 33131.

By the Commission.

Jonathan G. Katz  
Secretary

### Endnotes

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<sup>1</sup> The findings herein are made pursuant to Respondents' Offers and are not binding on any other person or entity in this or any other proceeding.

<http://www.sec.gov/litigation/admin/34-51017.htm>

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[Home](#) | [Previous Page](#)

Modified: 01/11/2005